Supreme Court, U.S.
FILED
NOV 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-461

CONTROL DATA CORPORATION,

Petitioner,

versus

C. E. SERVICES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

ERNEST R. HIGGINBOTHAM
KEVIN B. WIGGINS
Strasburger & Price
4300 InterFirst Plaza
901 Main Street, LB 175
Dallas, TX 75202
214/651-4300

MARY L. GREINER
Control Data Corporation
8100 34th Avenue South
Box 0
Minneapolis, MN 55440
612/853-6416

Counsel for Petitioner

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	1
I. Introduction	1
II. The Authorities Cited by Respondent Do Not Support the Use of the *Brown Shoe* Submarket Criteria To Establish Relevant Markets	1
III. The Record Below Established the Sevices Offered by IBM and "Third Party Maintenance Companies" Were Reasonably Interchangeable	3
IV. The Submarket Concept Is Inconsistent With the United States Justice Department's Revised Merger Guidelines	5
Conclusion	6
Certificate of Service	7

TABLE OF AUTHORITIES

	Page
Cases	
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	passim
C.E. Services v. Control Data Corp., 759 F.2d 1241 (5th Cir. 1985)	3
Nifty Foods v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980)	4
Saltz v. Hart, Schaffner and Marx, 1985-2 Trade Cas. ¶66, 768 (S.D.N.Y. 1985)	4
United States v. Continental Can Co., 378 U.S. 441 (1964)	2
United States v. Grinnell Corp., 384 U.S. 563 (1966)	2, 3
Statutes	
Section 7 of the Clayton Act, 15 U.S.C. § 18	2
Other Authorities	
Maisel, *Submarkets in Merger and Monopolization Cases*, 72 Geo. L.J. 39 (1983)	5
United States Department of Justice Merger Guidelines, 47 Fed. Reg. 28,493 (1982)	5

ARGUMENT

I.

Introduction

In its Brief in Opposition, Respondent C. E. Services ("CES") fails to apprehend the central argument made by Petitioner, i.e., that the notion of a "submarket" set forth in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), is erroneous and confusing and should be clarified. Rather, Respondent misstates Petitioner's argument, creates "strawmen" arguments which it easily refutes and concludes that the Petition should be denied. For the reasons which follow Respondent's arguments must be rejected. The Court should (1) grant Control Data Corporation's ("CDC") Petition (2) clarify for litigants and the lower courts the proper test for determining the relevant product market, and (3) reverse the decision of the Court of Appeals for the Fifth Circuit.

II.

The Authorities Cited By Respondent Do Not Support The Use of The *Brown Shoe* Submarket Criteria To Define Relevant Markets.

First, Respondent completely mischaracterizes this Court's holding in *Brown Shoe*. They incorrectly state the submarket concept supported the Court's correct conclusion that men's, women's and children's shoes comprised separate relevant markets. There was no contention in *Brown Shoe* that men's, women's and children's shoes were reasonably interchangeable and therefore should be included within the definition of the same relevant market. Rather, the discussion of submarkets was addressed to determining whether within these separate markets there were further delineations to be made based upon price and quality. It was those submarkets which this Court refused to sanction. Thus, the language regarding submarkets

in no way supported the Court's correct conclusion that there were separate markets for men's, women's and children's shoes.

Nor does this Court's decision in *United States v. Continental Can Co.*, 378 U.S. 441 (1964), offer any justification for the use of submarkets. To the contrary, the decision rejects the narrow submarket analysis which Respondent urges. In *Continental Can*, the district court concluded that glass and metal containers were separate lines of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18, even though there was actual competition between those products for various end uses. The district court relied on the *Brown Shoe* submarket indicia to determine there was industry or public recognition of glass and metal containers as separate entities and that glass and metal containers had peculiar characteristics and end uses. This Court held that notwithstanding these factors the glass and metal containers must be considered within the same relevant market because there was actual competition between them for numerous end uses.[1]

Finally, in *United States v. Grinnell*, 384 U.S. 563 (1966), the services at issue, i.e., unaccredited and accredited central station alarm systems, were by definition dissimilar. Accreditation was dependent upon an alarm station complying with specific requirements. If the unaccredited station had had the same characteristics as the accredited stations they would have been accredited. There were objective qualitative differences

---

[1] Contrary to Respondent's assertion this Court did not exclude "plastic, paper, foil and other containers" from the definition of the relevant market for the simple reasons that with respect to plastic, there was insufficient evidence in the record to determine whether it competed with glass or metal and with respect to the other products there simply was no evidence of competition. Thus, the Court did not decide to "draw the line at glass and metal containers" because there was no basis in the record for so doing.

between the services which led the Court to conclude the services could not properly be included within the same relevant market. Thus, the cases relied upon by Respondent support neither the propriety of the use of "submarkets" nor the decision of the Court of Appeals for the Fifth Circuit in this case.

III.
The Record Below Establishes the Services offered by IBM and "Third Party Maintenance Companies" Were Reasonably Interchangeable.

In its Petition, CDC urged the Court to clarify its decision in *Brown Shoe* and state clearly and unequivocally that the appropriate tests for determining relevant product markets are reasonable interchangeability of use or cross elasticity of demand. It further argued that this case is the appropriate vehicle for clarifying the law because it was undisputed the services offered were identical in every respect except price.

The one factor cited by the Court of Appeals which arguably goes to the issue of reasonable interchangeability of use or cross elasticity of demand is that IBM services and the services of the "third party maintenance companies" are not readily substituted.[2] *C. E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985) (Petition at B-11). This statement, however, cannot support the Court of Appeals decision because of the economically impermissible way CES chose to define the market. Because CES defined the market in terms

---

[2] CDC disputes the Fifth Circuit's suggestion that the products were not readily substituted. In the district court CDC offered evidence of not only actual substitution but also statements from consumers in the market that they considered the services interchangeable.

of price, more direct evidence of substitutability was impossible to adduce.

A recent decision, however, illustrates the reason the Court of Appeals' statement cannot preclude summary judgment. In *Saltz v. Hart Schaffner & Marx,* 1985-2 Trade Cas. ¶ 66,768 (S.D.N.Y. 1985), the plaintiff alleged that better quality and less expensive suits were in separate markets. As in the instant case, the primary distinction between the products was price. Plaintiff offered testimony from various individuals within the industry that there was no demand substitutability between better quality and other kinds of suits. The court found such evidence of lack of demand substitutability inadequate noting as follows:

> A major reason for plaintiff's inability to address demand substitutability adequately is its use of price as the sole discriminating characteristic by which to differentiate the markets. *When the submarket is defined by price, there is no ability to analyze whether an increase in price will affect the demand for a given market.* See *Brown Shoe Company v. United States,* 370 U.S. at 325-26; *Nifty Foods Corp. v. Great Atlantic and Pacific Tea Company,* 614 F.2d 832, 840 (2d Cir. 1980). Plaintiff argues that in this case it is not defining its market by price but merely using price as a proxy for quality. However, because plaintiff has presented no evidence of other distinguishing market characteristics, the market is for practical purposes defined by price. (Emphasis supplied.)

Saltz & Sons, Inc. v. Hart Schaffner & Marx, 1985-2 Trade Cas. at p. 63, 720-21.

In the instant case Respondent attempts to do precisely what the court in *Saltz* rejected. It argues that identical services can be placed in separate markets based on the price differential between IBM's services and those of other compa-

nies. As the *Saltz* court found, this circumstance precludes adequate cross-elasticity analysis. Yet unlike the *Saltz* decision, the opinion below, relying on the *Brown Shoe* dicta regarding submarkets, sanctions separation of identical services into separate markets on the basis of factors which simply are not appropriate for determining relevant product markets. Where products or services are identical there can be no question that they are reasonably interchangeable.

IV.

The Submarket Concept is Inconsistent with the United States Justice Department's Revised Merger Guidelines

In 1982 the United States Justice Department issued Revised Merger Guidelines. The purpose of the guidelines was to provide guidance to the business community, private lawyers and others in anticipating what standards will be used to challenge mergers. U.S. Department of Justice Merger Guidelines, 47 Fed. Reg. 28,493 (1982). Those guidelines do not mention submarkets as appropriate units of measuring market power. This Court's failure to correct and clarify the proper means for determining relevant markets will inhibit the procompetitive activity which the Revised Merger Guidelines were designed to encourage. Maisel, *Submarkets in Merger and Monopolization Cases,* 72 Geo. L.J. 39, 40 (1983).[3] The Court

---

[3] Petitioner does not ask the Court to adopt a "rigid rule" for defining relevant markets. Rather, what Petitioner requests is that the Court make clear that the submarket approach set forth in *Brown Shoe* is not proper for determination of the relevant market. The Court should clearly direct litigants' inquiries to the *appropriate* test set forth in *Brown Shoe,* i.e., reasonable interchangeability of use or cross elasticity of demand. While the contours of the relevant market must be made only after a "fact specific" determination, the submarket factors set forth in *Brown Shoe* are simply not relevant to determination of relevant market.

should take this opportunity to eliminate the notion of submarket from antitrust jurisprudence and focus attention on the proper determinants of the relevant product market.

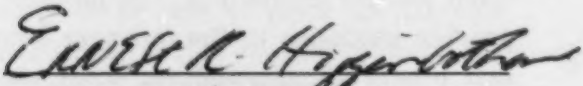
CONCLUSION

For the foregoing reasons and those stated in the Petition filed on September 16, 1985, Control Data Corporation's Petition for Writ of Certiorari should be granted.

DATED: November 27, 1985.

Respectfully submitted,

ERNEST R. HIGGINBOTHAM
KEVIN B. WIGGINS



Ernest R. Higginbotham
STRASBURGER & PRICE
4300 InterFirst Plaza
901 Main Street, LB 175
Dallas, TX 75202
214/651-4300

Mary L. Greiner
Control Data Corporation
8100 34th Avenue South
Box 0
Minneapolis, MN 55440
612/853-6416

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing REPLY BRIEF OF PETITIONER have been forwarded via United States mail, postage prepaid, to Paul J. VanOsselaer, Esq., Shapiro, Edens & Cook, 2200 One American Center, 600 Congress Avenue, Austin, Texas 78701, attorney for respondent C. E. Services, Inc., on this the 27th day of November, 1985.